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Lai Kee Peng (Messrs Lai Kee Peng & Assoc) v Tay Hup Lian

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-48–08 OF 2013(W)

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ARIFIN ZAKARIA CHIEF JUSTICE, ZULKEFLI CJ (MALAYA), ABDULL HAMID EMBONG, ABU SAMAH NORDIN FCJJ AND BALIA YUSOF JCA

20 JANUARY 2016

C

Civil Procedure — Judgment and orders — Default order — Remedy provided by — Whether default order directed stakeholder to release retention sum to purchaser

D

Contract — Assignment — Assignment of retention sum — Whether developer had right to assign — Whether assignment executed by developer valid — Whether absolute — Whether consent order prevented developer from assigning its interest in retention sum to purchaser

E

Contract — Agreement — Sale and purchase — Duties of stakeholder — Whether stakeholder entitled to release retention sum to purchaser — Whether stakeholder acted in accordance with default order — Whether default order directed stakeholder to release retention sum to purchaser

F

Under a sale and purchase agreement ('the SPA') dated 1 June 1994, the respondent agreed to sell 12 units of shoplots to Histyle Sdn Bhd ('Histyle') for a total purchase price of RM665,280. It was agreed between the respondent and Histyle that RM500,000 ('the retention sum') was to be paid by Histyle and retained by the appellant as a solicitor stakeholder and later released to the developer. The respondent's solicitor requested for the release of the retention sum but the appellant replied that she could not release the retention sum to the developer as she had been served with a consent order entered into by the parties in the High Court where the sum of RM500,000 was to be retained. The developer was the first defendant in the suit while Histyle was the second defendant. Histyle agreed to the consent order and to withhold the retention money. Neither the respondent nor the appellant was a party to the consent order. As a result of the appellant's refusal to release the retention sum, the developer threatened to sue the respondent for the said sum. Under the circumstances, the respondent had no other option but to fork out another sum of RM500,000 to pay the developer. The developer absolutely assigned its right to the retention sum to the respondent. When the respondent's solicitors demanded the appellant to pay the retention sum to their client, the request

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was not complied with and the respondent then sued the appellant for the recovery of the retention sum of RM500,000. Histyle, as the first defendant, counterclaimed and sought, among others, a declaration that the SPA had been terminated; and for the return of RM665,280 which it had paid to the respondent. The case struck out and judgment in default against the respondent was entered in respect of Histyle's counterclaim. The respondent applied to set aside the judgment in default but it was dismissed by the judicial commissioner. The respondent appealed to the Court of Appeal. As at the date of the notice of appeal the retention sum was still with the appellant. The solicitors for Histyle served the default judgment on the appellant and demanded that the appellant release the retention sum to them, to which the latter obliged notwithstanding the said appeal by the respondent. The Court of Appeal allowed the respondent's appeal, set aside the judgment in default in favour of Histyle and remitted the case to the Johor Bahru High Court for trial. The retention sum was ordered to be paid into court. Hence, the present appeal. The issues that arose for the court's determination were whether a solicitor acted lawfully by paying the stake to the party declared to be entitled to the same; in the event that the valid, legal and subsisting order is subsequently reversed upon appeal, was the solicitor concerned liable to make good the stake to the affected other party; and although declaratory orders were per se unenforceable, can an order, although in the form of a declaration, nonetheless be enforceable and thus subject to compliance if phrased accordingly.

Held, dismissing the appeal with costs:

(1) The Court of Appeal, in reversing the default judgment, found that the appellant had acted unreasonably in releasing the retention sum to Histyle. It held that there was no direction in the order of the suit ordering the appellant to forthwith pay out the retention sum to Histlye. The said order was declaratory in nature (see para 29).

(2) A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. This is different from an executory judgment where the courts determine the rights of the parties and then order the defendant to act in a certain way, for example by an order to pay damages. If it is disregarded, it can be enforced by official action, usually be levying execution against the defendant's property or imprisoning him for contempt of court (see para 30).

(3) When the respondent's solicitors requested the appellant to release the retention money to the developer, the appellant resisted on the misguided belief that she was bound by the consent order. When another demand was made to release the retention money to the respondent after the

developer had assigned its right to the money to the respondent, the appellant ignored the request and chose to release the money to Histyle based on the default judgment, which was later reversed by the Court of Appeal. The appellant had, in doing so, taken the risk in releasing the money to Histyle as the appeal against the default judgment was still pending in the Court of Appeal (see para 31).

(4) The respondent did not commit any breach of the SPA. Histyle had, contrary to its contention, in fact taken possession of the 12 units of shoplot. It did not terminate the SPA. The respondent was not a party to the consent order. The consent order did not bind the appellant and the respondent. The caveats had been removed and the property had been transferred to Histyle. The order could not be enforced against the appellant as she was not a party to the suit. The appellant had therefore misconstrued the order given by the judge and wrongfully released the retention sum to Histyle (see paras 32 & 34).

(5) The appellant, being the stakeholder, was liable in law to make good the stake to the respondent. As a matter of fact the default judgment was reversed by the Court of Appeal before the leave to appeal to this court was granted (see para 35).

[Bahasa Malaysia summary

Di bawah perjanjian jual beli ('PJB') bertarikh 1 Jun 1994, responden bersetuju untuk menjual 12 unit lot rumah kedai kepada Histyle Sdn Bhd ('Histyle') untuk jumlah harga belian RM665,280. Ia telah dipersetujui antara responden Histyle bahawa RM500,000 ('jumlah yang ditahan') perlu dibayar oleh Histyle dan ditahan oleh perayu sebagai peguamcara pihak berkepentingan dan kemudian dilepaskan kepada pemaju. Peguamcara responden telah meminta untuk melepaskan jumlah yang ditahan itu tetapi perayu menjawab bahawa dia tidak melepaskan jumlah yang ditahan kepada pemaju kerana dia telah diserahkan perintah persetujuan yang dimasuki oleh pihak-pihak di Mahkamah Tinggi di mana jumlah RM500,000 akan ditahan. Pemaju ialah defendan pertama dalam guaman itu manakala Histyle ialah defendan kedua. Histyle bersetuju dengan perintah persetujuan dan menahan wang tahanan itu. Responden atau perayu bukan pihak kepada perintah persetujuan. Akibat daripada keengganan perayu untuk melepaskan jumlah tahanan, pemaju mengugut untuk menyaman responden bagi jumlah tersebut. Dalam keadaan itu, responden tiada pilihan lain tetapi untuk mengeluarkan lagi sejumlah RM500,000 untuk membayar pemaju. Pemaju sememangnya memberikan haknya untuk jumlah yang tertahan kepada responden. Apabila peguamcara responden menuntut agar perayu membayar jumlah yang ditahan kepada anakguam mereka, permintaan itu tidak dipatuhi dan responden kemudian menyaman perayu untuk mendapat balik jumlah yang ditahan iaitu RM500,000. Histyle, sebagai defendan pertama, telah menuntut balas dan memohon, antara lain, satu deklarasi bahawa PJB tersebut telah ditamatkan;

dan untuk pulangan RM665,280 yang ia telah bayar kepada responden. Kes itu telah dibatalkan dan penghakiman ingkar terhadap responden dimasuki berkaitan tuntutan balas Histyle. Responden telah memohon untuk mengetepikan penghakiman ingkar tetapi ia telah ditolak oleh pesuruhjaya kehakiman. Responden telah merayu kepada Mahkamah Rayuan. Setakat tarikh notis rayuan itu jumlah yang ditahan masih dengan perayu. Peguamcara untuk Histyle telah menyampaikan penghakiman ingkar ke atas perayu dan menuntut bahawa perayu melepaskan jumlah yang ditahan kepada mereka, yang mana mereka diwajibkan meskipun terdapat rayuan tersebut oleh responden. Mahkamah Rayuan telah membenarkan rayuan responden, mengetepikan penghakiman ingkar menyebelahi Histyle dan meremitkan kes itu kepada Mahkamah Tinggi Johor Bahru untuk perbicaraan. Jumlah yang ditahan itu diperintahkan untuk dibayar kepada mahkamah. Justeru, rayuan ini. Isu-isu yang timbul untuk ditentukan mahkamah adalah sama ada peguamcara telah bertindak secara sah dengan membayar pegangan itu kepada pihak yang diisytiharkan berhak kepada yang sama; sekiranya perintah yang sah, sah dari segi undang-undang dan wujud itu kemudiannya diakas setelah dirayu, adakah peguamcara berkenaan bertanggungjawab untuk membayar kepentingan itu kepada pihak lain yang terjejas; dan walaupun perintah deklarasi itu per se tidak dikuatkuasakan, bolehkah perintah, walaupun dalam bentuk deklarasi, walau pun begitu boleh dikuatkuasakan dan dengan itu tertakluk kepada pematuhan jika diungkap sewajarnya.

Diputuskan, menolak rayuan dengan kos:

(1) Mahkamah Rayuan, dalam mengakas penghakiman ingkar, mendapati bahawa perayu telah bertindak secara tidak munasabah dalam melepaskan jumlah yang ditahan kepada Histyle. Ia memutuskan bahawa tiada arahan dalam perintah untuk guaman mengarahkan perayu untuk dengan serta-merta membayar jumlah yang ditahan kepada Hisytle. Perintah tersebut adalah bersifat deklarasi (lihat peranggan 29).

(2) Penghakiman ingkar adalah satu kenyataan rasmi oleh mahkamah menyebutkan tentang kewujudan atau ketidakwujudan keadaan urusan undang-undang. Ia menyebut tentang hubungan sah tetapi tidak mengandungi apa-apa perintah yang boleh dikuatkuasakan terhadap defendan. Ini berbeza daripada penghakiman pelaksanaan di mana mahkamah menentukan hak-hak pihak-pihak dan kemudian mengarahkan defendan bertindak dalam cara tertentu, contohnya melaui perintah untuk membayar ganti rugi. Jika ia tidak dihiraukan, ia boleh dikuatkuasakan dengan tindakan rasmi, biasanya akan mengenakan pelaksanaan terhadap harta defendan atau memenjarakannya kerana menghina mahkamah (lihat perenggan 30).

(3) Apabila peguamcara responden meminta perayu melepaskan wang yang ditahan itu kepada pemaju, perayu enggan berbuat demikian kerana silap

mempercayai bahawa dia terikat dengan perintah persetujuan itu. Apabila tuntutan lain dibuat untuk melepaskan wang yang ditahan itu kepada responden selepas pemaju memberikan haknya ke atas wang itu kepada responden, perayu tidak menghiraukan permintaan itu dan memilih untuk melepaskan wang itu kepada Histyle berdasarkan penghakiman ingkar tersebut, yang kemudiannya telah diakas oleh Mahkamah Rayuan. Perayu, dalam berbuat demikian, telah mengambil risiko dalam melepaskan wang itu kepada Histyle kerana rayuan terhadap penghakiman ingkar itu masih belum selesai di Mahkamah Rayuan (lihat perenggan 31).

(4) Responden tidak melakukan apa-apa pelanggaran PJB tersebut. Histyle telah, bertentangan dengan hujahnya, sebenarnya telah mengambil milikan 12 unit rumah kedai. Ia tidak menamatkan PJB tersebut. Responden bukan pihak kepada perintah persetujuan itu. Perintah persetujuan itu tidak mengikat perayu dan responden. Kaveat-kaveat telah dibatalkan dan hartanah tersebut telah dipindah milik kepada Histyle. Perintah itu tidak boleh dikuatkuasakan terhadap perayu kerana dia bukan pihak kepada guaman tersebut. Perayu oleh itu telah salah tanggap perintah yang diberikan oleh hakim dan telah salah dalam melepaskan jumlah wang yang ditahan itu kepada Histyle (lihat perenggan 32 & 34).

(5) Perayu, sebagai pihak berkepentingan, bertanggungjawab dari segi undang-undang untuk membantu merealisasikan pegangan responden. Pada hakikatnya penghakiman ingkar itu telah diakas oleh Mahkamah Rayuan sebelum kebenaran untuk merayu kepada mahkamah ini diberikan (lihat perenggan 35).]

Notes

For a case on assignment of retention sum, see 3(3) *Mallal's Digest* (5th Ed, 2015) para 3381.

For a case on default order, see 2(3) *Mallal's Digest* (5th Ed, 2015) para 5144.

For cases on sale and purchase, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3323–3327.

Cases referred to

Burt v Claude Cousins & Co Ltd and another [1971] 2 QB 426, CA (refd)

Datuk M Kayveas & Anor v Bar Council [2013] 5 MLJ 640; [2013] 7 CLJ 533, FC (refd)

Sorrell and another respondents and Finch appellant [1977] AC 728, HL (refd)

Legislation referred to

Trustee Act 1949 s 63

Appeal from: Civil Appeal No W-02–1997 of 2009 (Court of Appeal, Putrajaya)

Wong Hok Mun (Azim, Tunku Farik & Wong) for the appellant.
Gopal Sri Ram (MS Murthi and Lim Choon Kim with him) (Chambers of Murthi & Partners) for the respondent.

Abu Samah Nordin FCJ:

[1] This is a fairly straight forward case. It is a case involving a matter which any conveyancing solicitor should be familiar with. It concerns the duty and responsibility of a solicitor as a stakeholder in respect of money deposited by a purchaser for the benefit of the vendor or his assignee pending the execution of certain documents, including the transfer of ownership from the vendor to the purchaser pursuant to a sale and purchase agreement ('the SPA'). It is not uncommon, as is the case before us, that the dispute as to who is entitled to the money held by the solicitor as stakeholder ultimately depends on the terms under which the money is held and the due performance by the parties of their respective obligations under the SPA.

[2] Under the SPA dated 1 June 1994 the respondent, as the vendor, agreed to sell 12 units of shoplots in Plaza Kluang Baru to the purchaser, Histyle Sdn Bhd ('Histyle') for a total purchase price of RM665,280. The developer of the Plaza Kluang Baru is Lian Foong Housing (M) Sdn Bhd ('the developer'). It was agreed between the respondent and Histyle that a sum of RM500,000 ('the retention sum') was to be paid by Histyle and retained by the solicitor, who is the appellant before us, as a stakeholder. The retention sum was to be released to the developer in accordance with cl 4 of the SPA.

[3] Clause 4 of the SPA states:

> 4 The purchaser's Solicitors are hereby authorised by all the parties hereto to release the Retention Sum to the Developer forthwith upon all the following events stipulated below are satisfied:
>
> (a) the issue document of title to the said Land is duly registered in favour of the Purchaser free from all encumbrances in pursuance to Clause 5.1 of the said Sale and Purchase Agreement dated 24th August 1993;
>
> (b) the Vendor executing all relevant documents relating to the assignment of their benefits and interests to the Property in favour of the Purchaser;
>
> (c) all the existing caveats on the said Land are removed; and

(d) all documents in respect of the transfer of ownership of the Property from the Vendor to the Purchaser is completed, and the delivery of the original of the following documents to the Purchaser:

(i) the original copy of the First Principal Agreement.

[4] On 16 October 1995, Messrs Murthi and Partners, the solicitors for the respondent wrote to the appellant requesting her to release the retention sum together with interest thereon to the developer as the conditions under cl 4 of the SPA had been complied with. The appellant was at the material times the sole proprietor of Messrs Lai Kee Peng & Assoc.

[5] On 25 October 1995 the appellant replied that she could not release the retention sum to the developer as she had been served with a consent order dated 24 October 1994 entered into by the parties in the Johor Bahru High Court Originating Summons No 24–164 of 1994. She stated that under the consent order:

> We are supposed to retain the sum of RM500,000 for the benefit of the plaintiffs in respect of the payment of any incidental costs arising out of the strata titles for their respective lots.

[6] The plaintiffs in the said originating summons are purchasers of other shoplots in Plaza Kluang Baru. The developer is the first defendant in the said originating summons. Histyle is the second defendant. The respondent before us is not a party to the said originating summons.

[7] The relevant part of the consent order reads as follows:

> DAN DENGAN PERSETUJUAN ADALAH SELANJUTNYA DIPERINTAHKAN BAHAWA Defendan kedua dikehendaki menahan wang jumlah sebanyak RM500,000.00 sahaja (yang merupakan baki harga belian 12 unit kedai terletak di Tingkat Satu Plaza Kluang Bahru daripada TAY HUP LIAN, seorang namaan Defendan Pertama) untuk kepentingan Plaintif-Plaintif dan kegunaan untuk bayaran kos permohonan keluaran hakmilik strata ...

[8] It is observed that although the money had been deposited with the appellant to be held by her as a stakeholder under the SPA, Histyle nevertheless agreed to the consent order and to withhold the retention money for the benefit of the plaintiffs. Neither the respondent nor the appellant was a party to the consent order.

[9] As a result of the appellant's refusal to release the retention sum, the developer threatened to sue the respondent for the said sum.

[10] Under the circumstances the respondent had no other option but to fork out another sum of RM500,000 to pay the developer, which she did, via bankers cheque dated 10 January 1996, as full settlement of the sums due to the developer. By a deed of reassignment dated 27 February 1996 the developer absolutely assigned its right to the retention sum to the respondent. On 22 April 1996 the respondent's solicitors demanded the appellant to pay the retention sum to their client. The request was not complied with.

[11] Thus, on 6 May 1996 the respondent sued the appellant for the recovery of the retention sum of RM500,000 together with interest thereon: vide Kuala Lumpur High Court Civil Suit No 1–22–206 of 1996.

[12] This suit was transferred to Johor Bahru High Court and renumbered as JB Civil Suit No 22–200 of 1997 ('JB Suit'). An amendment was made by substituting the appellant with Histyle and the Management Committee for Plaza Baru, Kluang as the first and second defendants respectively. As a result of the amendment the appellant ceased to be a party to the JB Suit. In the JB Suit the respondent sought an order that the stakeholder, ie the appellant, release the retention sum of RM500,000 together with interest thereon to the respondent. The first defendant, Histyle, counterclaimed and sought among others, a declaration that:

(a) the SPA had been terminated;

(b) a return of RM665,280 which it had paid to the respondent; and

(c) the retention sum of RM500,000 and interest thereon be forfeited by Histyle.

[13] The case was then fixed for case management before Syed Ahmad Helmy JC on 24 February 2004, who struck out the respondent's suit due to non-attendance of her solicitor. The learned judicial commissioner also allowed judgment in default against the respondent in respect of Histyle's counterclaim. By the judgment in default Histyle obtained a declaration, among others, that the SPA was declared null and void and that the retention sum held by appellant, as a stakeholder, be forfeited by Histyle.

[14] On 4 March 2004 the respondent applied to set aside the judgment in default. It was dismissed by the learned judicial commissioner. The respondent appealed to the Court of Appeal. As at the date of the notice of appeal the retention sum was still with the appellant.

[15] But on 10 January 2005 Messrs Nora SW Lam & Assoc, solicitors for Histyle, served the default judgment on the appellant and demanded that the appellant released the retention sum to them.

[16] On 14 January 2005 the appellant released the retention sum to Histyle's solicitors notwithstanding the said appeal by the respondent. The appellant, by letter dated 17 January 2005 told the respondent's solicitors that she was not obliged to find out whether they would appeal against the judgment in default. Even if they appealed, she would still comply with the default judgment since there was no order for stay of execution.

[17] On 10 December 2007 the Court of Appeal allowed the respondent's appeal, set aside the judgment in default in favour of Histyle and remitted the case to the Johor Bahru High Court for trial.

[18] Pending the disposal of the JB Suit, the respondent filed an originating summons in Kuala Lumpur High Court vide OS 53–24–2248 of 2008 for an order to direct the appellant to pay the retention sum in court in an interest bearing account within three months of the said order.

[19] On 7 August 2009 Zabariah JC dismissed the respondent's originating summons with costs on the grounds that the appellant had already released the retention sum to Histyle pursuant to the default judgment given by Syed Ahmad Helmy JC on 5 January 2005. There was no order to stay the execution of the said default judgment. Her ladyship also held that it was premature for the respondent to make the application as the claim for the retention sum was still pending before the Johor Bahru High Court. The learned judge was also of the opinion that the retention sum was no longer held by the appellant. Even if the respondent was entitled to the retention sum, the order should have been made against Histyle.

[20] The respondent, being dissatisfied, appealed against the said decision to the Court of Appeal.

[21] In the meantime, the trial of the JB Suit had already commenced. On 29 April 2010, Vernon Ong J after a full trial made an order that the appellant, as the stakeholder, release the retention sum together with the interest thereon to the respondent's solicitors. In the event Histyle was in possession of the money, it has to pay the money to the stakeholder. There was no appeal against the said decision.

[22] On 11 October 2011 the Court of Appeal allowed the respondent's appeal against the decision of Zabariah JC and ordered the retention sum to be paid into court.

[23] On 18 July 2013 the appellant obtained leave of this court to appeal against the decision of the Court of Appeal which had set aside the decision of Zabariah JC on the following questions of law:

(i) where a solicitor acts quo stakeholder for 2 parties (vendor and purchaser in a sale & purchase agreement involving real property) and is served with a valid, legal and subsisting order of the High Court declaring that the stake in question be forfeited by one of those two parties, then:

(a) does the solicitor act lawfully by paying the stake to the party declared to be entitled to the same; and

(b) in the event that the valid, legal and subsisting order is subsequently reversed upon appeal, is the solicitor concerned liable to make good the stake to the affected other party; and

(ii) although declaratory orders are per se unenforceable, can an order, although in the form of a declaration, nonetheless be enforceable and thus subject to compliance if phrased accordingly.

[24] The appellant did not deny being the stakeholder in respect of the retention money under the SPA. She justified her action in releasing the retention sum on the ground that she had acted lawfully and rightfully in compliance with the order of the court dated 5 January 2005 served on her by Histyle's solicitors. In the alternative, she sought refuge under s 63 of the Trustee Act 1949 which states as follows:

> 63 If it appears to the Court that a trustee, whether appointed by the Court or otherwise, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the Court in the matter in which he committed such breach, then the Court may relieve him either wholly or partly from personal liability for the same.

[25] Section 63 speaks of liability of a trustee. By invoking s 63 she put herself as a trustee for the retention sum.

[26] A stakeholder is a person who receives money and holds it in medio pending the outcome of a future event:

> *Kuldip Singh & Anor v Lembaga Letrik Negara & Anor* [1983] 1 MLJ 256. How the money is to be released depends on the terms on which it is held; which in the case before us, is Clause 4 of the SPA. The word 'Stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future and whoever is in possession of the money is often described as a stakeholder: *Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116.

[27] The liability of a solicitor in respect of money deposited with him as a stakeholder was considered by Lord Denning in *Burt v Claude Cousins & Co Ltd and another* [1971] 2 QB 426, whose judgment, which we reproduce

below, had been endorsed by the House of Lords in *Sorrell and another respondents and Finch appellant* [1977] AC 728:

> If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the event: see *Skinner v The Trustee of The Property of Reed and Others* [1967] 2 All ER 1286 at p 1287, per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank; in which case he is entitled to keep for himself any interest that accrues to it: see *Harington v Hoggart* (1830) 1 B & Ad 577]. If the purchaser should become entitled to the return of his deposit, he must sue the estate agent or solicitor for it: see *Eltham v Kingsman* (1818) 1 B & Ald 683 and *Hampden v Walsh* (1876) 1 QBD 189). He cannot sue the vendor, because the vendor has never received it, or become entitled to receive it.

[28] A concise and yet comprehensive statement of the law on the duty and responsibility of a stakeholder had been restated quite recently by this Court in *Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640; [2013] 7 CLJ 533. Jeffrey Tan FCJ, in delivering the judgment of the court said:

> [31] In our system of conveyancing, 'the word 'stake' is in common parlance used to apply to any money to be disposed of in accordance with what may happen in future: and whoever is in possession of the money is often described as a stakeholder. The manner in which the money is to be disposed of depends on the terms on which it is held' (*Toh Theam Hock v Kemajuan Perwira Management Corporation Sdn Bhd* [1988] 1 MLJ 116; [1987] 2 CLJ 26; [1987] CLJ (Rep) 400 per Hashim Yeop A Sani SCJ, as he then was, delivering the judgment of the former Supreme Court). 'Solicitors who hold funds which are paid to them as stakeholders hold those funds as trustees for the client, whose property the funds remains at all times. Such funds are not held in a contractual or quasi-contractual capacity' (*Halsbury's Laws of England* 4th edn. reissue vol. 44(1) para. 126). '... the obligations arising under a solicitor's undertaking go beyond contractual effect. They are obligations which a solicitor has a professional duty, as well as a contractual duty, to observe' (*Bentley and another v Gaisford and another* [1997] 1 All ER 842, 848 per Sir Richard Scott VC). When solicitors hold funds as stakeholders, they hold those funds as trustees and not in a contractual or quasi-contractual capacity (see *Alimand Computer System Ltd v Radcliffes & Co*, The Times 6 November 1991). 'If an estate agent or solicitor, being duly authorised in that behalf, receives a deposit 'as stakeholder', he is under a duty to hold it in medio pending the outcome of a future event. He does not hold it as agent for the vendor, nor as agent for the purchaser. He holds it as trustee for both to await the evidence: see *Skinner v The Trustee of The Property of Reed and Others* [1967] 2 All ER 1286 at p 1287, [1967] Ch 1194 at p 1200) per Cross J. Until the event is known, it is his duty to keep it in his own hands; or to put it on deposit at the bank ...' (*Burt v Claude Cousins & Co Ltd and another* [1971] 2 QB 426 per Lord Denning MR in his dissenting judgment, which statement of the law was accepted by the House of Lords in *Sorrell and another respondents and Finch appellant* [1977] AC 728, and referred in *Kuldip Singh & Anor v Lembaga Letrik Negara & Anor*, *Dato' Seri Au Ba Chi & Anor v Malayan United Finance Bhd & Anor*

and *OCBC Bank (Malaysia) Bhd & Ors v Lee Lee Fah & Ors & Another Appeal*, amongst others). 'Once a solicitor holds money in trust for his client or any other party for a purpose, it does not matter whether the amount is sufficient to be utilised for that purpose. The money remains to be in trust' (*Selvaratnam a/l Vellupillai v Dr Jayabalan Karrupiah* [2009] 1 MLJ 794; [2009] 1 CLJ 872; per Zaki Azmi CJ, delivering the majority judgment of the Court). Therefore, it is beyond argument that a stakeholder is a trustee and that the breach of a stakeholding term is not just a breach of undertaking but also a breach of trust.

[29] The Court of Appeal, in reversing the default judgment, found that the appellant had acted unreasonably in releasing the retention sum to Histyle. It held that there was no direction in the order of the Johor Bahru High Court ordering the appellant to forthwith pay out the retention sum to Histlye. The said order was declaratory in nature.

[30] A declaratory judgment is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. This is different from an executory judgment where the courts determine the rights of the parties and then order the defendant to act in a certain way, for example by an order to pay damages. If it is disregarded, it can be enforced by official action, usually be levying execution against the defendant's property or imprisoning him for contempt of court: Lord Woolf and Jeremy Woolf, *The Declaratory Judgement*, (4th Ed) Sweet & Maxwell.

[31] When the respondent's solicitors requested the appellant to release the retention money to the developer in 1995 on the strength that all the conditions under cl 4 of the SPA had been complied with, the appellant resisted on the misguided belief that she was bound by the consent order. When another demand was made in 1996 to release the retention money to the respondent after the developer had assigned its right to the money to the respondent, the appellant ignored the request and chose to release the money to Histyle based on the default judgment, which was later reversed by the Court of Appeal. The appellant had, in doing so, taken the risk in releasing the money to Histyle as the appeal against the default judgment was still pending in the Court of Appeal.

[32] The outcome of the trial in the JB suit was not in favour of Histyle. After a full trial, Vernon Ong J held that all the conditions under cl 4 of the SPA for the release of the retention sum had been complied with. The respondent did not commit any breach of the SPA. Histyle had, contrary to its contention, in fact taken possession of the 12 units of shoplot. It did not terminate the SPA. The respondent was not a party to the consent order. The consent order did not bind the appellant and the respondent. The caveats had been removed and the property had been transferred to Histyle.

[33] There was no appeal against the decision by the learned judge. Although the appellant was not a party to the JB suit by reason of the amendment, the contentious issues pertaining to the SPA had finally been settled.

[34] It is now appropriate to advert to the questions posed to us. Question i(a) is based on the assumption that the order of the High Court was a valid order and binding on the appellant and not subject to appeal. It is obvious that said order could not be enforced against the appellant as she was not a party to the JB suit. She ceased to be a party to the JB Suit after the respondent amended the writ and substituted her with Histyle. The appellant had therefore misconstrued the order given by the learned judge and wrongfully released the retention sum to Histyle.

[35] The answer to question (i)(b) is obvious. The appellant, being the stakeholder, is liable in law to make good the stake to the affected party, which is the respondent before us. As a matter of fact the default judgment was reversed by the Court of Appeal on 10 December 2007 before the leave to appeal to this court was granted.

[36] In view of the above answers, we do not find it necessary to answer question (ii).

[37] In the upshot, the appellant is dismissed with costs.

Appeal dismissed with costs.

Reported by Afiq Mohamad